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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)
RAINBOW BROADCASTING COMPANY) File Nos. BMPCT-910125KE
For Extension of Construction) BMPCT-910125KE
Permit and For Consent to) BTCCT-911129KT
Transfer of Control of Station)
WRBW(TV), Orlando, Florida)

To: The Commission

RAINBOW OPPOSITION TO PRESS EMERGENCY PETITION

Rainbow Broadcasting Company, permittee of UHF television Station WRBW, Channel 65, Orlando, Florida, hereby opposes the 13 August 1993 filing by Press Broadcasting Company entitled "Emergency Petition for Immediate Rescission, Setting Aside or Vacation of Action Taken Pursuant to Delegated Authority". Press' Petition (page 1) asks the Commission "to immediately rescind, set aside, vacate or otherwise nullify the action taken by the Chief, Mass Media Bureau," in reconsidering and granting an extension of time to construct and a pro forma transfer of control of Rainbow. The basis for Press' Petition is the claim that the proceeding was a restricted one and that Rainbow violated the ex parte rules by speaking to members of the Commission's staff during the reconsideration process. As will be shown, Press mistakes the law.

Press, operator of independent UHF Station WKCF(TV), Cocoa, Florida, would be competitively benefitted by preventing Rainbow's WRBW(TV), a new independent UHF station, from operating in the market. In furtherance of this anticompetitive effort, Press has objected at every stage to Rainbow's efforts to move forward with construction and commencement of operation of its station, including its initially successful effort to prevent grant of Rainbow's Form 307 extension request filed in January 1991 (File No. BMPCT-910125KE) and its *pro forma* transfer request filed in November 1991 (File No. BTCCT-911129KT). Of controlling relevance in the present context, however, because it determines the applicability of the Commission's *ex parte* rules, is the fact that Press, a party with no legal standing to object to Rainbow's requests,^{1/}

1/ Press has apparently sought to formalize its status or position itself for an otherwise wholly impermissible appeal by asserting competitive standing under *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). However, Press' failed to seek timely intervention in the underlying licensing proceeding and a standing claim cannot support an otherwise impermissible effort to prevent or delay Rainbow's operation now. Nor could Press establish standing, either administrative, *Tele-Visual Corp.*, 33 F.C.C.2d 418 (1972); *Coronado Communications Company*, 8 FCC Rcd. 159, 160 (BB 1992), or judicial, *California Association of Physically Handicapped v. F.C.C.*, 778 F.2d 823 (D.C. Cir. 1985), to challenge the minor modifications at issue here because such actions, unlike the underlying grant, do not and cannot cause aggrievement. Moreover, and as a separate matter, Press' informal objections have never been accompanied by affidavits of persons with personal knowledge of the

has pursued its efforts through the filing of pleadings specifically denominated "informal objections".

When the Commission revised its *ex parte* rules in 1987, it restructured them into "three broad categories": 1) proceedings to which no *ex parte* constraints would apply, "as well as certain other general exemptions from the *ex parte* rules"; 2) "'non-restricted'" proceedings, "in which *ex parte* presentations would generally be permitted but would be subject to specific disclosure requirements"; and "'restricted' proceedings, in which, subject to the exemptions, no *ex parte* presentations would be permitted." *Ex Parte Rules*, 2 FCC Rcd. 3011 (1987). As Press correctly notes, citing a letter from the Managing Director to the author of a letter commenting on an earlier Rainbow extension request, the present situation fits into the third category, "restricted" proceedings. However, it does not follow therefrom, as Press contends, that Rainbow was prohibited from engaging in *ex parte* communications with the Commission staff concerning its extension of time to construct.

facts asserted, barring them from formal consideration by Section 309(d)(1) of the Act. See *Christian Broadcasting Association*, 77 F.C.C.2d 858 (1980); *KHVH, Inc.*, 77 F.C.C.2d 890 (1980). Press' claim to formal participatory rights should be explicitly rejected.

In its revision of Rule 1.1204, the Commission specifically exempted "adjudicative proceedings which", like the present one, "are not formally opposed, do not involve mutually exclusive applications, and have not been designated for hearing." *Ex Parte Rules, supra*, 2 FCC Rcd. 3011, 3016; see Rule 1204(a)(1). Further, the newly revised rules specifically authorized *ex parte* contacts between an applicant in Rainbow's position and the Commission's staff (but not informal objectors like Press and the writer of the letter to the Managing Director) by adopting a Note, applicable to Rule 1.1204(a)(1), which provides that in proceedings exempted under that subsection:

[O]ral *ex parte* communications are permissible, but only between the Commission and the formal party involved or his representative. Any informal objectors (whether their objections are oral or written) are subject to *ex parte* procedures set forth in 1.1208 barring *ex parte* contacts except where confidentiality is necessary to protect those persons from reprisals. . . .

In an apparent attempt to avoid the force of this provision, Press suggests that because at an earlier stage of this proceeding it filed a petition for reconsideration of a Commission action granting Rainbow an extension of time to construct, its status can now *nunc pro tunc* be upgraded to that of a formal objector and the proceeding converted into a non-exempt one. This line of

reasoning is multiply flawed: In the first place, it was Press' express intent at the time to be an informal objector. A petition for reconsideration was filed only because the Commission had already granted the extension request by the time Press' informal objections were lodged; the reconsideration pleading did not constitute a formal objection but simply resubmitted the original informal objections under a new title. See Petition, page 2 & n.2.

Secondly, Press was not entitled to seek reconsideration, because informal objectors are barred as a matter of law from doing so by Rule 1.106(b). See *Redwood Microwave Association*, 61 F.C.C.2d 442 (1976). Third, even were such a petition not otherwise prohibited, reconsideration is available only to parties to the proceeding, which Press was not, or "any other person whose interests are adversely affected" by the Commission's action, and who "state[s] with particularity the manner in which [his] interests are adversely affected." Press failed to make the required recitation and that failure was fatal.^{2/}

^{2/} As a practical matter, the only effect of any Rainbow extension on Press is to defer the very competition Press seeks to avoid, thus actually conferring a benefit.

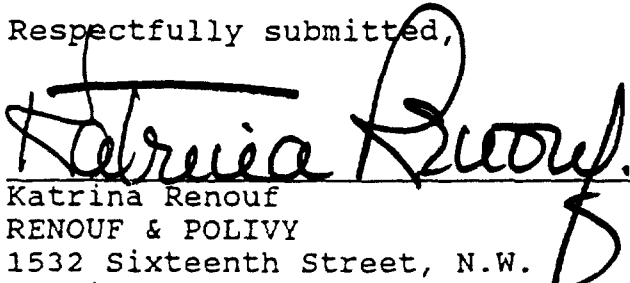
And finally, even Press' improper effort to denominate its unauthorized petition for reconsideration the "formal objection" which triggers the *ex parte* rules concerned only a single extension of time, action on which would dispose of whatever objections had been made in that proceeding. Thus it was necessary for Press to file new oppositions to both the subsequent request for pro forma transfer and any subsequent extension proceeding, such as the present one. This it did, but in each case as an informal objector (its original April 30, 1993 opposition herein was entitled "Supplement to Informal Objections"), thus ensuring the exempt status of the proceeding under Rule 1.1204(a)(1) and the Note thereto.

The Commission's rules make it very easy for a party seeking to invoke *ex parte* restrictions to do so: it is necessary only to file a formal opposition. Even when such pleadings have been treated as informal objections by the staff they have been deemed to confer the formality requisite to imposition of *ex parte* constraints. *E.g.*, *Letter to Michael L. Glaser*, 4 FCC Rcd. 4557. But the Commission has been very clear, both in and after the 1987 rulemaking that until the filing of a formal opposition, the formal party to the proceeding remains free to engage in *ex parte* communication with the staff and to do

so without disclosure. See *Ex Parte Communications*, 3 FCC Rcd. 3995 (1988). Accordingly, there has been no *ex parte* violation here.

Given the obvious inapplicability of the *ex parte* rules, it seems equally obvious that Press' real purpose here was to file an unauthorized application for review of the staff's action on the merits in a guise which would induce its consideration. Thus, Press seeks to characterize itself as the "losing party" (Petition, page 6), when it is not and never has been a party at all. Press' efforts have already delayed inauguration of Rainbow's service by almost two years. This further effort to abuse Commission processes to prevent or delay the inauguration of a competing station after Rainbow has gone forward with construction in reliance upon the extension, should be summarily rejected.

Respectfully submitted,


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26 August 1993

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Rainbow Opposition to Press Emergency Petition were sent first class mail, postage prepaid, this twenty sixth day of August 1993, to the following:

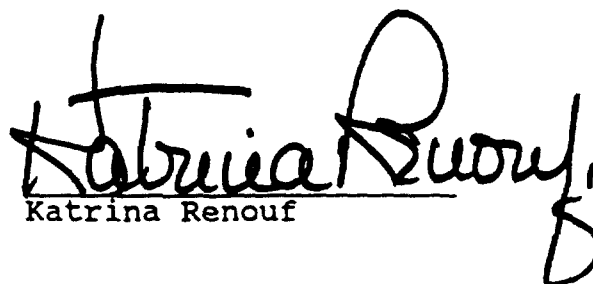
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